

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>WOLF CARBON SOLUTIONS US, LLC,</p> <p><i>Petitioner,</i></p> <p>v.</p> <p>IOWA UTILITIES BOARD, A DIVISION OF THE DEPARTMENT OF COMMERCE, STATE OF IOWA,</p> <p><i>Respondent.</i></p>	<p>CASE NO. _____</p> <p>BRIEF IN SUPPORT OF VERIFIED PETITION FOR TEMPORARY & PERMANENT INJUNCTIVE RELIEF</p> <p><i>(EXPEDITED CONSIDERATION REQUESTED)</i></p>
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COMES NOW, Petitioner Wolf Carbon Solutions US, LLC ("WCS") with this Brief in Support of Petitioner's Verified Petition for Temporary and Injunctive Relief (this "Brief"):

FACTUAL BACKGROUND

The relevant facts relating to this litigation are adequately detailed in the Verified Complaint and other filings accompanying this Brief. Recitation of those facts would be repetitive and unnecessary here for the purposes of this Brief. Accordingly, WCS hereby incorporates by reference the factual allegations, legal allegations, and previously defined terms contained in the Verified Petition and other related filings as if fully set forth herein.

ARGUMENT

I. EXPOSURE OF THE REQUESTED LIST WOULD VIOLATE IOWA CODE § 22.7(18). INJUNCTIVE RELIEF IS WARRANTED.

A. LEGAL CONTEXT.

Iowa's Open Records Act carries a presumption that records held by lawful government custodians are potentially available to inspection by those who request them. *See* IOWA CODE § 22.2(1); *see also* *Gabrilson v. Flynn*, 554 N.W.2d 267, 271 (Iowa 1996). But this presumption is

not absolute. Certain categories of records held by government agencies are shielded from disclosure under specified circumstances set forth under Iowa Code Chapter 22. *See* IOWA CODE § 22.7; *see also Ripperger v. IA Pub. Info. Bd.*, 967 N.W.2d 540, 550 (Iowa 2021) (holding "[t]here is a presumption in favor of disclosure...[b]ut as to records exempt under section 22.7, 'the legislature performed its own balancing and made the policy choice to protect such records categorically.'" (quoting *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 229 (Iowa 2019), in turn quoting, *Hall v. Broadlawns Med. Ctr.*, 811 N.W.2d 478, 485 (Iowa 2012))).

One well-established exception to Iowa's Open Records Act is IOWA CODE § 22.7(18).

That Code section, in relevant part, reads as follows:

18. Communications not required by law, rule, procedure, or contract that are made to a government body or to any of its employees by identified persons outside of government, to the extent that the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination. As used in this subsection, "persons outside of government" does not include persons or employees of persons who are communicating with respect to a consulting or contractual relationship with a government body or who are communicating with a government body with whom an arrangement for compensation exists. Notwithstanding this provision:

a. The communication is a public record to the extent that the person outside of government making that communication consents to its treatment as a public record.

b. Information contained in the communication is a public record to the extent that it can be disclosed without directly or indirectly indicating the identity of the person outside of government making it or enabling others to ascertain the identity of that person.

IOWA CODE § 22.7(18). In short, this Code section is designed to protect those outside of government who voluntarily provide information to a government entity when not legally required so as to prevent the discouragement of future voluntary disclosures absent consent or release in such manner that would blanketly protect the disclosure of personally identifiable information.

See id.

The Iowa Legislature "enacted section 22.7(18) 'to permit public agencies to keep confidential a broad category of useful incoming communications which might not be forthcoming if subject to public disclosure'" *Ripperger*, 967 N.W.2d at 551 (quoting *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895, 898 (Iowa 1988)). For example, the Iowa Supreme Court has held that IOWA CODE § 22.7(18) applies to keep confidential employment applications for city manager positions. *See Press Club*, 421 N.W.2d at 896 and 899. The High Court has also held that communications related to an investigation of an elementary school principal are also protected under the same Code section. *See Des Moines Indep. Comm. Sch. Dist. Pub. Recs. v. Des Moines Reg. & Trib. Co.*, 487 N.W.2d 666, 667, 670 (Iowa 1992). Most recently, just last year, the Iowa Supreme Court held that a county assessor could withhold a list of names of property owners who requested their names to be withheld from public listing under the implied promise of confidentiality of such requests. *See Ripperger*, 967 N.W.2d at 551.

B. LAW AS APPLIED TO PRESENT FACTS.

IOWA CODE § 22.7(18)'s confidentiality protections apply here. WCS voluntarily shared the List to the IUB. *See Aff.* at ¶¶ 19-20. At that time, WCS requested that the List be confidential and WCS reasonably believed that such confidentiality would be assured. *See Aff.* at ¶¶ 14 and 21. WCS' understanding was, and is, that the landowner/occupiers along the proposed Hub corridor route also believed that the List information will be kept confidential and away from open public view. *See Aff.* at ¶¶ 23-24. Both of these beliefs are reasonable and understandable under the circumstances. *See Ripperger*, 967 N.W.2d at 551.

WCS was never required by any law, rule, or formal procedure to share the List with the IUB, but it did so anyway with an intent to show cooperation in the consideration of and potential approval of the proposed Hub project under the regulatory purview of the IUB. *See Aff.* at ¶ 20.

WCS is a "person outside of government" under IOWA CODE § 22.7(18), and would have hesitated — if not outright refused — to provide the List if it had known it would be subject to disclosure. *See* Aff. at ¶ 14. Now that the List is in danger of public exposure when it was presumed it would not be, WCS and the landowner/occupiers whose information is contained in the List could be reasonably discouraged from ever providing voluntary information to the government again unless compelled by law, rule, or policy. *See* IOWA CODE § 22.7(18). *See also Press Club*, 421 N.W.2d at 898. Further, to WCS' knowledge, no landowner/occupier has provided consent to the release of information pertaining to them contained in the List, nor is it possible for the List to be released in any reasonable manner that would not disclose otherwise personal, private, sensitive, or confidential information identifying those in the List. *See* IOWA CODE § 22.7(18)(a)-(b).

This case is nearly on all fours with the Iowa Supreme Court's decision just a year ago in *Ripperger*. There, the Court held that landowners who submitted their names to a county assessor to be shielded as confidential from public dissemination, and who were under the assumption that such confidentiality would be protected, were entitled to have the records of such communications requesting confidentiality covered within the ambit of IOWA CODE § 22.7(18). *See* 967 N.W.2d at 551. The result should be the same here: information regarding property owners, tax payers, and landowners/occupiers who voluntarily provided their information to WCS, never expecting the information to be made public, have a valid expectation of confidentiality. *See id.* WCS voluntarily shared the List with the IUB, requested confidentiality, and genuinely and reasonably expected that request to be honored. If the List is ordered to be released, neither landowners/occupiers nor WCS will ever again voluntarily provide similar information for fear of promises not being kept. Likewise, consent to release such information by landowners/occupiers

will become all but impossible in this and future instances. Under IOWA CODE § 22.7(18) the disclosure of the List should be prohibited.

II. EXPOSURE OF THE REQUESTED LIST WOULD VIOLATE IOWA CODE § 22.7(3). INJUNCTIVE RELIEF IS WARRANTED.

A. LEGAL CONTEXT.

IOWA CODE § 22.7(18) is not the only statutory bar to improper disclosure of certain records in possession of public entities. IOWA CODE § 22.7(3) also applies to this case. It commands that records may not be released if they are: "[t]rade secrets which are recognized and protected as such by law." IOWA CODE § 22.7(3). Under Iowa law, a "trade secret" means "information, including but not limited to, a formula, pattern, *compilation*, program, device, method, technique, or process" that: **(a)** Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by another person by proper means; and **(b)** Is subject to efforts under the circumstances to maintain its secrecy. *See* IOWA CODE § 550.2(4)(a)-(b) (emphasis added). Information that could "provide an advantage to [a] competitor is a legitimate concern — not a theoretical one..." *Sysco Iowa, Inc. v. Univ. of Iowa*, 889 N.W.2d 235, 241 (Iowa Ct. App. 2016). Information in the hands of a government entity, "if disclosed, [could] effectively provide competitors with a blueprint of [a company's] operating model not otherwise available to them...[and may allow competitors] to be able to use the information to gain an unfair advantage in bids for future contracts." *Id.*

Where the existence of potential exposure of trade secrets exists, disclosure is prohibited by law. *See* IOWA CODE § 22.7(3); *see also Sysco*, 889 N.W.2d at 242 ("We find the contract...contains trade secrets as defined in [Iowa law]. Those trade secrets are exempt from disclosure under Iowa's Open Records Act because they qualify as 'confidential information' under section 22.7").

B. LAW AS APPLIED TO PRESENT FACTS.

The List is fundamentally a trade secret under Iowa law because it is a "compilation" of informational material that derives independent economic value, and through this litigation has been sought to be kept confidential by affirmative means. *See* IOWA CODE §§ 22.7(3); and 550.2(4)(a)-(b). The information in the List has independent economic value because "the value to the owner or a competitor" can provide a "competitive edge or economic advantage" to whoever possesses it. *U.S. West Comm'cs, Inc. v. Office of Consumer Advocate*, 498 N.W.2d 711, 714 (Iowa 1993). If other pipeline operators who wish to conduct business within the Hub corridor possessed this information for free due to a public release of the List by the IUB, this would inherently diminish any independent economic value of the List as to WCS. *Id.* at 714 ("information kept secret that would be useful to a competitor and require cost, time, and effort to duplicate is of economic value.").

Moreover, WCS has taken affirmative measures to attempt to keep the List confidential. WCS requested confidential treatment of the List to the IUB when it shared it voluntarily. *See* Aff. at ¶¶ 21; 22 and 28. Although the IUB has not yet made a ruling on that confidential treatment request, nevertheless, the request itself is evidence of a desire by WCS to keep the List out of the public sphere. Further, WCS has initiated this litigation to ensure that the List is not exposed. Both of these factors lean heavily in favor of the satisfaction of the elements of the trade secret test for IOWA CODE § 22.7(3).

For these reasons, the List should be prohibited from disclosure under IOWA CODE § 22.7(3)'s "trade secrets" exception to the Iowa Open Records Act.

III. EXPOSURE OF THE REQUESTED LIST WOULD VIOLATE IOWA CODE CHAPTER 550. INJUNCTIVE RELIEF IS WARRANTED.

A. LEGAL CONTEXT.

The Iowa Legislature has enacted a "Uniform Trade Secrets Act." *See* IOWA CODE §§ 550.1, *et seq.* As noted above, a "trade secret" means "information, including but not limited to, a formula, pattern, **compilation**, program, device, method, technique, or process" that: **(a)** Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by another person by proper means; and **(b)** Is subject to efforts under the circumstances to maintain its secrecy. *See* IOWA CODE § 550.2(4)(a)-(b). While similar to the provisions of Iowa's Open Records Act providing for protection against the improper exposure of trade secrets under IOWA CODE § 22.7(3), Iowa Code Chapter 550 provides a separate and distinct independent injunctive relief cause of action and set of remedies for situations like this.

The "owner of a trade secret may petition the district court to enjoin an actual or threatened misappropriation,"¹ and "[i]n appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order." *Id.* at § 550.3(1) and (3). If the owner of a trade secret is a prevailing party in an injunction action to protect the disclosure of a trade secret, the Court may award actual and reasonable attorneys' fees. *Id.* at 550.6.

The only defense to injunctive relief sought in an action under Iowa Code Chapter 550 is if the owner of the trade secret impliedly or expressly consented to the trade secret's disclosure to a third party. *Id.* at § 550.5. Where the owner of a trade secret has not consented to disclosure,

¹ In the context of this case, "misappropriation" under Iowa Code Chapter 550 would include "[d]isclosure...by a person who at the time of disclosure or use knows that the trade secret is derived from or through a person who owes a duty to maintain the trade secret's secrecy or limit its use." IOWA CODE § 550.2(3)(e). In this instance, the trade secret in question is the List voluntarily shared by WCS to the IUB, and the IUB is on notice that the List was intended to be kept confidential at the time of the sharing.

and litigation remains ongoing, "a court shall preserve the secrecy of an alleged trade secret by reasonable means, including but not limited to granting protective orders in connection with discovery proceedings," as well as "holding in-camera hearings, sealing the records of the action, and ordering a person involved in the litigation not to disclose an alleged trade secret without prior court approval." *Id.* at 550.7.

B. LAW AS APPLIED TO PRESENT FACTS.

"There is virtually no category of information that cannot, as long as the information is protected from disclosure to the public, constitute a trade secret." *Iowa Film Prod. Servs. v. Iowa Dept. of Econ. Dev.*, 818 N.W.2d 207, 220 (Iowa 2012) (quoting *U.S. West Comm'cs., Inc.* 498 N.W.2d at 714). Courts have previously held under Iowa's Uniform Trade Secrets Act that improper disclosure and potential subsequent use of prospective customer/client lists are entitled to confidential treatment. *See, e.g., Smithfield Packaged Meats Sales Corp. v. Dietz & Watson, Inc.*, 452 F.Supp.3d 843, 855 (S.D. Iowa Apr. 7, 2020) (list of potential customers protected via injunction under the Iowa Uniform Trade Secret Act); *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 775 (Iowa 1999) ("Business information may also fall within the definition of a trade secret, including...maintenance of data on customer lists...price data and figures...customer information [and] financial information...").

The List here is essentially no different. The List is a compilation document, prepared by WCS for use in prospective business operations. As stated above, it has independent economic value, and if it were to be released to opponents of the Hub project or potential competitors, it would harm WCS and its business operations. *See U.S. West Comm'cs, Inc.*, 498 N.W.2d at 714. Further, WCS has taken multiple steps to maintain the secrecy of the List. Yes, the List was provided voluntarily to the IUB as part of an informal regulatory request not required by law, rule,

or procedure. *See* Aff. at ¶ 14. But the List was only shared with the IUB voluntarily with a caveat — that a request for confidentiality may apply. *See* Aff. at ¶ 22. No consent was given by WCS or the landowners/occupiers named in the List for its public release. *See* Aff. at ¶¶ 23-25.

Now, under threat of improper exposure of the List and the trade secrets it contains, WCS is left with no choice but to avail itself of the injunctive relief cause of action and other remedies under Iowa Code Chapter 550. The Court should enjoin the List's release under IOWA CODE § 550.3, as well as award reasonable attorneys' fees and costs under IOWA CODE § 550.6.

IV. EXPOSURE OF THE REQUESTED LIST WOULD VIOLATE IOWA CODE § 22.7(6). INJUNCTIVE RELIEF IS WARRANTED.

A. LEGAL CONTEXT.

Yet another Iowa Open Records Act exemption equally applies to this case which is legally adjacent to the pertinent trade secrets issues in question. IOWA CODE § 22.7(6) protects information from exposure if it may be commercially sensitive. It reads, in relevant part, that otherwise public records such as "[r]eports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose," may not be subject to disclosure. IOWA CODE § 22.7(6). This provision is designed to give private enterprises who interact with government regulators assurances that their otherwise private information provided during agency interactions will not be exposed to others operating in the same commercial sphere, particularly where such information may be proprietary or sensitive. *See U.S. West Comm'cs, Inc.*, 498 N.W.2d at 714 (in a case regarding this particular open records exception, holding "[w]e believe that a broad range of business data and facts which, if kept secret, provide the holder with an economic advantage over competitors or others, qualify as trade secrets.").

B. LAW AS APPLIED TO PRESENT FACTS.

IOWA CODE § 22.7(6) applies to this case and requires non-disclosure of the List. As stated above, the List contains private, confidential, and sensitive information collected regarding landowners/occupiers along the proposed Hub corridor. The content of the List has economic value intrinsic to the present and future operations of WCS, and if it were to be improperly distributed by IUB, could provide an advantage to current or future competitors in the carbon capture pipeline industry in Iowa. *See* IOWA CODE § 22.7(6); *see also Sysco of Iowa, Inc.*, 889 N.W.2d at 241 (protecting business information given to a government body where "[t]he relevant portions of the contract would, if disclosed, effectively provide competitors with a blueprint of [the company's] operating model not otherwise available to them," and "competitors...would be able to use the information to gain an unfair advantage in bids for future contracts.").

The release of the List would also serve no public purpose. While carbon capture pipelines may be controversial to some, the private business operations of an independent enterprise are just that — private. There is no public purpose in exposing certain proprietary information unnecessarily just because some opponents of WCS are curious. The fact that the WCS Hub project may have some impact on members of the public — in fact, will **positively** impact members of the public through environmental and monetary benefits, among others — does not mean the exposure of the List would be in the public interest.²

² By way of analogy, just because the consumption of carbonated beverages might "impact" some members of the public, does not entitle a particular inquisitor to the recipe of Coca-Cola. The fact that WCS provided the List to the IUB under an impression of confidentiality does not mean that WCS believes it would be in the public interest for the List to be revealed unintentionally to the entire world. *See generally MA LEG Partners I v. City of Dallas*, 442 F.Supp.3d 958, 967 (N.D. Tex. 2020) ("For example, disclosing that the Coca-Cola recipe is kept at 1 Coca-Cola Plaza, NW Atlanta, GA 30313, is not the same as disclosing the actual recipe.").

Further, as will be discussed in more detail below, exposing the List so that objectors and agitators against the Hub project can more effectively coordinate to the detriment of WCS is not in the public interest. Instances of vandalism and violent action taken against pipeline projects are unfortunately a reality in today's society. For example, the Keystone XL Pipeline was vandalized multiple times, causing substantial property and land damages. So much so that the FBI had to investigate in conjunction with local law enforcement to determine the identities of the saboteurs.³ This type of vigilante behavior is not uncommon to Iowa either. Just last year, two Iowa "climate activists" were sentenced to nearly a decade in federal prison for participating in a sabotage operation against the Dakota Access pipeline, which included arson against pipeline equipment using oxyacetylene cutting torches and gasoline soaked rags.⁴ Anti-pipeline vandalism and the threat thereof has risen to the level where, in the last few years, the Iowa Legislature has enacted statutes providing for enhanced penalties in order to deter anti-pipeline actors from such violent behavior. *See, e.g.*, IOWA CODE §§ 716.11 and 716.12 ("critical infrastructure sabotage"). Opening up any opportunity to facilitate potential violence or property damage against a prospective pipeline is not in the public interest, particularly where the threat is very real. *See Adionser v. Dept. of Justice*, 33 F.Supp.3d 23, (D.D.C. 2014) (denying a federal FOIA request where it appeared that "people would be put at risk of violence if their identities became public," holding

³ *See, e.g.*, Caley Gibson, *Vandalized Transformer Led To Keystone Pipeline Operating At Reduced Rate*, GLOBAL NEWS ONLINE (Jul. 20, 2022), available at, <https://globalnews.ca/news/9004320/keystone-pipeline-vandalized-transformer/> (last visited Sept. 7, 2022).

⁴ *See* Philip Joens, *Iowa Climate Activist Sentenced To Eight Years In Federal Prison For Dakota Access Pipeline Sabotage*, THE DES MOINES REGISTER (Jun. 30, 2021), available at, <https://www.desmoinesregister.com/story/news/crime-and-courts/2021/06/30/iowa-activist-jessica-reznicek-sentenced-dakota-access-pipeline-sabotage-catholic-workers/7808907002/> (last visited Sept. 7, 2022).

that the requestors of the records did "not identif[y] any public interest sufficient to outweigh the...concern for personal safety...").

For the reasons stated above, the Court should prohibit the release of the List under IOWA CODE § 22.7(6).

V. EXPOSURE OF THE REQUESTED LIST WOULD VIOLATE THE CLYMER/DELAMATER COMMON LAW PRIVACY STANDARD. INJUNCTIVE RELIEF IS WARRANTED.

A. LEGAL CONTEXT.

In addition to Iowa's Open Records Act and Iowa's Uniform Trade Secrets Act mandating non-disclosure in this case, an applicable judicially sculpted privacy balancing test applies as well to this case. A tandem set of cases handed down by the Iowa Supreme Court during the 1990s set forth a multi-factor balancing test to be employed in situations where privacy concerns may mandate public record protection whether or not a relevant statutory provision providing for such protection applies. *See Clymer v. City of Cedar Rapids*, 601 N.W.2d 42 (Iowa 1999) and *DeLaMater v. Marion Civil Servs. Comm'n*, 554 N.W.2d 875 (Iowa 1996). This is commonly known as the *Clymer/DeLaMater* standard.⁵

Under the *Clymer/DeLaMater* standard, five factors are to be considered by a court prior to the disclosure of potentially public information. Those factors are:

- 1.) The public purpose of the party requesting the information;
- 2.) Whether the purpose could be served without disclosing personal information;

⁵ Some have questioned whether the *Clymer/DeLaMater* standard is still good law in Iowa. *See American Civil Liberties Union Foundation of Iowa, Inc. v. Atlantic Comm. Sch. Dist.*, 818 N.W.2d 231, 239-240 (Iowa 2012) (Cady, J., dissenting). But there has never been a majority of the Iowa Supreme Court that has endorsed any overruling of it. *See 5 AM.JUR.2D Appellate Review* § 519 (2022) ("plurality decisions of a state supreme court, in which no majority agrees to the reasoning, are not binding under the doctrine of *stare decisis*..."). Therefore, it is still binding on this Court. *See, e.g., State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990) ("We are not at liberty to overturn Iowa Supreme Court precedent).

- 3.) The scope of the request;
- 4.) Possible alternatives to receive similar information; and
- 5.) The gravity of the invasion of privacy involved.

See Clymer, 601 N.W.2d at 45; *see also DeLaMater*, 554 N.W.2d at 879. Where a person has a substantial privacy interest in their personal information — for example, their address, birth date, gender, or other otherwise sensitive content — it outweighs any public interest under the Iowa Open Records Act. *Clymer*, 601 N.W.2d at 47. In other words, this "balancing test weighs an individual's privacy interests against the public's need to know." *Doe v. Univ. of Iowa*, Case No. 12-0357, 2013 WL 85781, at *4 (Iowa Ct. App. Jan. 9, 2013) (citing *Clymer*, 601 N.W.2d at 45).

B. LAW AS APPLIED TO PRESENT FACTS.

Under the *Clymer/DeLaMater* balancing test, the information contained in the List should remain confidential. The List contains the personal information of individuals along the prospective Hub pipeline route, such as addresses, contact information, and the monikers of business entities that may be designed to facilitate the privacy of certain landowners/occupiers. *See Aff.* at ¶ . This is precisely the type of information the *Clymer/DeLaMater* standard was meant to protect.

As to the balancing factors, as stated elsewhere in this Brief, the public purpose of releasing the List is outweighed by the invasion of the business enterprise interests of WCS, the risk of frustration of otherwise lawful prospective business relations and contractual relationships, the threat of use by competitors to WCS' disadvantage, the risk of potential harassment, ridicule, and other repercussions against listed landowners/occupiers, among other things. There is also no feasible way any potential public purpose could be served without disclosing personal information. *The List is literally a list consisting of personal information and personal information only.* Its exposure, even in part, would run counter to this element of the *Clymer/DeLaMater* balancing test.

The factor relating to the request is similarly too broad to be acceptable. As stated, the List is a compilation of personal information. It can either be disclosed in full — which would violate the *Clymer/DaLaMater* balancing test — or redacted in full to the point where its release would be practically useless. As to the possible alternative abilities for the Requestors to receive similar information, there are other means, but those means (such as public records databases or similar search mechanisms), is a concern for the Requestors, not WCS. WCS should not incur potential costs to satisfy the possible adverse interests of those seeking the List.

Lastly, the gravity of the invasion of confidentiality involved is potentially severe. As stated elsewhere in this Brief, the List is a trade secret with independent economic value. Allowing it to be floated into the public sphere could have serious business, regulatory, social, safety-related, and other consequences. As such, the factors under the *Clymer/DeLaMater* standard tip towards the maintenance of confidentiality in this case. *See Clymer*, 601 N.W.2d at 45; *see also DeLaMater*, 554 N.W.2d at 879.

VI. EXPOSURE OF THE REQUESTED LIST RISKS FACILITATING UNLAWFUL INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS. INJUNCTIVE RELIEF IS WARRANTED.

A. LEGAL CONTEXT.

Iowa recognizes the tort of interference with prospective contractual relations. *See, e.g., Preferred Marketing Associated Co. v. Hawkeye Nat. Life Ins. Co.*, 452 N.W.2d 389, 395-96 (Iowa 1990) (citing *Nesler v. Fisher & Co. Inc.*, 452 N.W.2d 191, 195 (Iowa 1990)). *See also* RESTATEMENT (SECOND) OF TORTS § 766B. To recover on a claim in Iowa, a plaintiff must prove:

- 1.) The existence of a prospective contractual or business relationship;
- 2.) Knowledge of the prospective business relationship;
- 3.) Intentional or improper interference with the relationship;
- 4.) The interference caused the relationship to fail to materialize; and
- 5.) Resulting damages.

Preferred Marketing, 452 N.W.2d at 395-96. (citing *Nester*, 452 N.W.2d at 198-99). *See also Blumenthal Inv. Trusts v. City of West Des Moines*, 636 N.W.2d 255, 269 (Iowa 2001); *Ballou v. Kurtenbach*, Case No. 21-1014, 2022 WL 2824286, at *6 (Iowa Ct. App. Jul. 20, 2022).

Although most commonly used as a tort action for damages, a claim for interference with prospective contractual relations is also a basis for an affirmative injunction to prevent possible interference during pending litigation. *See, e.g., Green v. Racing Ass'n of Cent. Iowa*, 713 N.W.2d 234, 238, 243-46 (Iowa 2006); (affirming an injunction on a contractual relationship interference claim); *Westway Trading Corp. v. River Terminal Corp.*, 314 N.W.2d 398, 404 (Iowa 1982) (affirming a lower court's issuance of an injunction to prevent interference with prospective contractual interference).

B. LAW AS APPLIED TO PRESENT FACTS.

Exposure of the List risks a serious possibility that potential contractual relations with the landowners/occupiers on the List may deteriorate or become impossible. "An easement is a contract." 81 AM. JUR. *Proof of Facts* 3D 199 (2022). Every landowner/occupier on the list is a potentially prospective contract partner with WCS should the Hub route flow through their real estate parcels. The release of the List would automatically expose the existence of prospective contractual or business relationships between WCS and any named landowner/occupier on the list.

If the Requestors have a copy of the List, it is likely — if not certain — that the Requestors or those acting in concert will have knowledge of any prospective contractual or business relationships between WCS and any listed person. Given that it is common knowledge the Requestors and their affiliates are opposed to the Hub pipeline project, there is a palpable risk that efforts would be made to intentionally or improperly interfere with any prospective contractual or business relations. It follows that such intentional or improper interference will cause at least one,

if not many, prospective contractual or business relationship opportunities for WCS to fail. This would cause irreparable damage and put the viability of the Hub route pipeline project at meaningful risk.

Because preemptive injunctive relief is permissible under this cause of action in Iowa, the Court should enter a temporary and permanent injunction preventing the release of the List now to prevent any potential and foreseeable damage to WCS. *See Green*, 713 N.W.2d at 238, 243-46 *Westway Trading Corp.*, 314 N.W.2d at 404

VII. EXPOSURE OF THE REQUESTED LIST RISKS FACILITATING UNLAWFUL INTERFERENCE WITH PROSPECTIVE ADVANTAGE. INJUNCTIVE RELIEF IS WARRANTED.

A. LEGAL CONTEXT.

Separate and distinct from WCS' claim of risk of interference with prospective contractual relations is a similar, yet related, claim of the risk of interference with prospective advantage. These causes of action are "considerably different" in nature. *Nesler*, 452 N.W.2d at 198-99 (quoting *Farmers Co-op Elevator, Inc., Duncombe v. The State Bank*, 236 N.W.2d 674, 674 (Iowa 1974)). In an action for interference with prospective advantage, the elements for recovery are:

- 1.) Existence of a prospective relationship that would provide a business advantage;
- 2.) Knowledge of the prospective business relationship;
- 3.) Intentional or improper interference with the relationship;
- 4.) Interference had a causal relationship to the third party not continuing the prospective relationship;
- 5.) Interference tended to prevent a plaintiff to obtain the prospective relationship; and
- 6.) Resulting damages.

Nesler, 452 N.W.2d at 199 (citing *Gordon v. Noel*, 356 N.W.2d 559, 563 (Iowa 1984) and *Harsha v. State Bank*, 346 N.W.2d 791, 799 (Iowa 1984)). "A binding contract is not necessary to support a claim for interference with prospective business advantage. Such a claim may be based on a

prospective business relationship that has not yet been reduced to a contract." *Economy Roofing & Insulating Co. v. Zumaris*, 538 N.W.2d 641, 651 (Iowa 1995).

Injunctive relief is routinely sought in cases where claims of interference with prospective business advantage are made. *See, e.g., Hockenberg Equip. Co. v. Hockenberg Equip. & Supply Co.*, 510 N.W.2d 153, 158 (Iowa 1993).

B. LAW AS APPLIED TO PRESENT FACTS.

WCS is one of only three (3) currently active enterprises that are seeking to enter the carbon capture pipeline market in Iowa. The Hub pipeline project cannot be completed and viable without securing easements from persons whose names are contained on the List. In other words, the List's contents are itself a "business advantage" for the ability of WCS to successfully compete in the pipeline market in Iowa. *See, e.g., Burke v. Hawkeye Nat. Life Ins. Co.*, 474 N.W.2d 110, 115 (Iowa 1991) (holding unauthorized potential customer list dissemination may establish a claim for interference with prospective business advantage). Conversely, other competing pipeline projects, if they have the List's information, could undercut that advantage. *See id.* ("In the competitive insurance market, the details of a policyholder's existing coverage are guarded closely, since receipt of such information would give significant selling advantage to the recipient."). Additionally, those who vigorously oppose the pipeline project — such as the Requestors — could use the List to inhibit the List's ability to provide a business advantage to WCS by interfering with those potentially along the proposed Hub route. This raises the specter of interference with WCS' prospective business advantages as it relates to the content and usefulness of keeping the proprietary List confidential. *See Nesler*, 452 N.W.2d at 199.

At the current time, WCS has completed all of its required public information meetings in conjunction with the IUB. Therefore, WCS is now entitled to directly negotiate with potentially

impacted or interest landowners/occupiers along the proposed Hub route. *See* IOWA CODE § 479B.4(6). The List, by its contents, provides WCS an advantageous position to engage in prospective business relationships with those landowners/occupiers that facilitates a business advantage. If the List were to be released, then knowledge of those advantageous prospective business relationships would be free for all to see, competitors and opposition groups alike. Exposure of the List's contents raises the chances of intentional or improper interference with WCS' prospective business relationships with the List's landowners/occupiers by orders of magnitude. If such interference caused or tended to prevent WCS from securing easements along the Hub route corridor due to the release of the List, damages would necessarily result.

Because all of the factors of this cause of action are present in this case, the Court should enter injunctive relief in favor of WCS under the facts presented. *See, e.g., Hockenberg Equip. Co.*, 510 N.W.2d at 158; *Economy Roofing*, 538 N.W.2d at 651.

VIII. EXPOSURE OF THE REQUESTED LIST RISKS FACILITATING THE VIOLATION OF CONSTITUTIONALLY PROTECTED ASSOCIATIONAL RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. LEGAL CONTEXT.

The First Amendment guarantees the right of free association. *See* U.S. CONST. amend. I. *See also United States v. Robel*, 389 U.S. 258, 263 (1967) ("an individual's right of association...is protected by the provisions of the First Amendment...it is clear that those rights protected by the First Amendment are no less basic in our democratic scheme."). "[T]o limit the right of association places an impermissible restraint on the right of expression." *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkley*, 454 U.S. 290, 300 (1981). This First Amendment right is incorporated as against the states pursuant to the Fourteenth Amendment. *See, e.g., Kingsley Intern. Pictures Corp. v. Regents of Univ. of State of N.Y.*, 360 U.S. 684, 684 (1959).

The right to association under the Federal Constitution doesn't stop or start within the boundaries of political association only. "[I]t is immaterial" whether the association in question "is political, *economic*, religious, or cultural" in its essence. *Americans for Prosperity v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (citing and quoting *NAACP v. Alabama*, 377 U.S. 288, 460 (1964)) (emphasis added). Any "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP*, 377 U.S. at 461. The Iowa Supreme Court has acknowledged and endorsed this approach to First Amendment associational rights in this State. *See, e.g., City of Maquoketa v. Russell*, 484 N.W.2d 179, 184 (Iowa 1992) ("The First Amendment also protects as a fundamental right the freedom to engage in associations for the advancement of *economic*, religious, or cultural matters.") (emphasis added). It is under "these principles we [must] begin our analysis to determine whether [government action] chills First Amendment rights." *Id.*

This analysis governs whether or not the party claiming associational rights is an individual or a corporate entity. *See Citizens United v. F.E.C.*, 558 U.S. 876, 913 (2010) (holding "the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

B. LAW AS APPLIED TO PRESENT FACTS.

The exposure of the information contained in the List is constitutionally improper. The disclosure of names of persons — corporate or individuals — with whom WCS wishes to potentially seek voluntary easements for the Hub project creates a serious and palpable risk of "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *NAACP*, 357 U.S. at 462. "The crucial factor is the interplay of governmental

and private action, for it is only after [the production of the List] that private action takes hold." *Id.* at 463.

The commercial speech and association which WCS wishes to engage in using the information compiled in the List is protected under the First Amendment and should not and cannot be impeded by the exposure of otherwise sensitive information by a government entity. *See generally IA Supreme Ct. Bd. of Prof'l Ethics v. Wherry*, 569 N.W.2d 822, 825 (Iowa 1997) (citing *Virginia Pharm. Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-71 (1976)). Put differently, when WCS voluntarily shared the List with the IUB, WCS never imagined it may be giving up its right to commercial association with potentially interested landowners/occupiers — and for good reason. One cannot bargain away their constitutional rights in the process of attempting to voluntarily cooperate with a government regulator. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("For at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit...[the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests..."); *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1077 (6th Cir. 1994) ("well established Supreme Court precedent [says] that a state actor cannot constitutionally condition the receipt of a benefit, such as a liquor license or an entertainment permit, on an agreement to refrain from exercising one's constitutional rights...").

Make no mistake: WCS' pipeline permit has not been approved yet. If difficulties in obtaining voluntary easements to complete the Hub project materialize because landowners/occupiers are afraid to disclose information necessary to complete the route due to their personal, private, and confidential information being disclosed through potentially endless open records requests by strangers, serious economic harm will result to not only WCS but those

with whom WCS wishes to associate. *See* Aff. at ¶ 25. *See also Americans for Prosperity*, 141 S. Ct. at 2383; *NAACP*, 377 U.S. at 460-62. The Court now has the ability to strike the appropriate balance in this situation by preserving WCS' associational rights with injunctive relief and upholding fundamental constitutional principles that, if not observed, may inflict serious harm on others.

Lastly, as indicated above, the threat of negative economic, property, and physical repercussions by those who oppose pipeline projects are real. *Supra*, fns. 3 and 4. This is an important factor in cases that implicate First Amendment Rights. *See, e.g., Doe v. Reed*, 561 U.S. 186, 203 (2010) ("Acknowledging that in reality, we have long held that speakers can obtain as-applied exemptions from disclosure requirements if they can show 'a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from either government officials or private parties.'" (Alito, J., concurring) (citing and quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (*per curiam*)). "[C]ompelled disclosure can 'burden the ability to speak,' and 'seriously infringe on privacy of association...guaranteed by the First Amendment.'" *Id.* (quoting *Buckley*, 424 U.S. 64). The circumstances in this case vacillate towards avoiding such potential consequences. *See NAACP*, 357 U.S. at 463 (holding that potential chilling or deterrent effects as the result of corporate document disclosure outweighs the interests of any actor requesting it).

"[A] long and unbroken line of...precedents holds that privacy of association is protected under the First Amendment." *Reed*, 561 U.S. at 280 (Thomas, J. dissenting). This includes associations of a commercial nature, like the Hub pipeline project here. *See Americans for Prosperity*, 141 S. Ct. at 2383. Injunctive relief to prevent any interference with prospective commercial association rights of WCS is appropriate.

PRAYER FOR RELIEF

For the reasons stated in this Brief, and in the other documents and filings submitted in this action by WCS, WCS asks that temporary and permanent injunctive relief preventing the improper exposure of the List be entered in its favor. Expedited relief and an opportunity for a hearing is also requested.

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Respectfully submitted,

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